

The Honorable Thomas T. Glover
Chapter 11
Hearing Date: January 9, 2009
Hearing Time: 9:30 a.m.
Hearing Location: Seattle, WA

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re

GEN CON LLC,

Debtor.

No. 08-10844-TTG

MEMORANDUM IN SUPPORT OF PLAN
CONFIRMATION

I. INTRODUCTION

Gen Con LLC, the debtor-in-possession ("Debtor" or "Gen Con"), by and through counsel, Shelly Crocker and Crocker Kuno PLLC, files this memorandum in support of confirmation of its Chapter 11 Plan of Reorganization ("Plan"). The Debtor's Plan provides for the contribution of cash on hand and future profits until the pre-petition debts of the Debtor are paid in full with interest at a healthy five percent rate. The Debtor estimates that general unsecured creditors will be paid in full by October of 2012 and that the plan will be complete in October of 2013. Every voting class has voted to accept the Plan as proposed. Indeed, only one creditor, albeit a large one, voted against the Plan. Confirmation will allow Gen Con to continue to employ people and to offer an annual convention that has been going on for more than 40 years.

MEMORANDUM IN SUPPORT OF PLAN CONFIRMATION - 1

CROCKER KUNO PLLC

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II. PLAN OBJECTIONS & AMENDMENTS

The Debtor's Amended Plan dated December 4, 2008, accompanied by the Debtor's First Amended Disclosure Statement, was transmitted to creditors and equity security holders. Confirmation is supported factually by the concurrent Declaration of Adrian Swartout in Support of Plan Confirmation.

Objections to the Plan were filed by LucasFilm Ltd, Gen Con Acquisition Group as the assignee of LGC Associates, LLC's debt, and Robert Callender, Jr., executor of the estate of Robert J. Callender, Sr. and Barbara Callender, as successor in interest to ISSG, LLC. The objections are summarized below, along with a response to the objection by Robert Callender, Jr.. The remainder of the Debtor's responses to the objections is included in Section III, below.

LucasFilm filed an objection to the plan on the basis that its claim is being treated unequally in violation of Section 1123(a)(4), that the plan is discriminatory, unfair, and inequitable in violation of Section 1129(b)(1), that the plan is not in the best interest of creditors as required by Section 1129(a)(7)(A)(ii), and that the plan is not feasible under 1129(a)(11).

Gen Con Acquisition Group filed an objection to the plan on the basis that the plan is proposed in bad faith under Section 1129(a)(3); that the settlement of insider avoidance actions violates 1123(b)(3)(A), 1129(a)(1), and Bankruptcy Rule 9019; and that the Plan is not in the best interest of creditors as required by Section 1129(a)(7).

1 The Estate of Callender filed an objection to the plan asserting that the Debtor's plan
2 should not be confirmed because the Estate of Callender's claim is not included in the
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4 Amended Plan and because the Estate of Callender did not receive notice of the bankruptcy
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6 filing or any documentation pertaining to the Chapter 11 case.
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10 The Estate of Callender's claim is included in the Debtor's Plan. The Estate of
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12 Callender is asserting ownership of the claim of ISSG. First Private Bank and Trust has also
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14 asserted ownership of ISSG's claim, going so far as to file a collection suit against Gen Con
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16 in late 2007. See Disclosure Statement at 7. First Private Bank and Trust represented a
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18 number of times through sworn declarations that it owned the debt and provided Debtor's
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20 counsel with an Accounts Receivable Purchase Agreement signed by Robert Callender, Sr. on
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22 behalf of ISSG apparently transferring the debt from ISSG to First Private Bank and Trust.
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24 The debt is included in the Debtor's schedules and Plan as a debt owed to First Private Bank
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26 and Trust in the amount of \$74,250.00. The Estate's attorney has represented to Debtor's
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28 counsel orally that the claim was the subject of a settlement between the parties in May of
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30 2008, which transferred the debt back to the Estate of Callender. If this is the case, the owner
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32 of the debt was properly served, and the Estate of Callender has been excluded based on its
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34 failure to file a proof of claim or a claim transfer, not because of any defect in the Debtor's
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36 notifications. The Estate of Callender's objection to the Debtor's Plan confirmation should be
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38 denied.
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III. DISCUSSION

A. The Plan Satisfies the Confirmation Requirements of Section 1129(a) of the Bankruptcy Code.

Section 1129(a) of the Code, 11 U.S.C. §§ 101 et. seq., provides that a court shall confirm a plan only if all of the requirements of Bankruptcy Code § 1129(a) are met.

1. The Plan Complies with Title 11, as Required by Section 1129(a)(1).

Section 1129(a)(1) requires that a plan comply with "the applicable provisions of this title." The applicable provisions include Bankruptcy Code §§ 1122 and 1123, which govern the classification of claims and interests and the contents of a plan of reorganization. See In re Commercial Western Finance Corp., 761 F.2d 1329, 1338 (9th Cir. 1985) (two of the applicable provisions are §§ 1123(a)(1) and 1122(a)); H.R. Rep. No. 595, 95th Cong., 1st Sess. 412 (1977) ("Paragraph (1) requires that the plan comply with the applicable provisions of Chapter 11, such as sections 1122 and 1123, governing classification and contents of a plan").

a. The Plan Properly Classifies Claims and Interests as Required by Section 1122.

Section 1122(a) provides that a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to other claims or interests in that class. "Such a requirement ensures that large claims of differing legal natures do not dictate the other claims within a class." In re Elsinore Shore Associates, 91 B.R. 238, 256 (Bankr. D.N.J. 1988). Section 1122(b) provides that a plan may designate a separate class of

1 unsecured claims that are less than or reduced to an amount necessary and reasonable for
2
3 administrative convenience.
4

5 The Debtor's Chapter 11 Plan (hereinafter the "Plan") has split unsecured claims into
6
7 three classes: an administrative convenience class of claims less than \$1,000, a general
8
9 unsecured class, and a subordinated class of insider claims. Although LucasFilm objects to
10
11 the classification of their claim, they provide no basis for treating it in any way different from
12
13 other general unsecured claims. Unsecured claims held by insiders have been placed in a
14
15 separate class by consent, and insider claims have been subordinated to the claims of general
16
17 unsecured creditors. The Plan complies with Bankruptcy Code § 1122.
18
19
20

21 **b. The Plan Complies with the Requirements of Section 1123.**
22

23 Section 1123 sets forth the mandatory and permissive contents of a plan. As
24
25 demonstrated below, the Plan contains each of the mandatory provisions and several of the
26
27 permissive provisions discussed in that section.
28
29
30

31 **(1) Compliance with Section 1123(a).**
32

33 Section 1123(a)(1) of the Code requires that a plan designate classes of claims and
34
35 interests, other than claims of a kind specified in Bankruptcy Code § 507(a)(1) (administrative
36
37 expense claims), Bankruptcy Code § 507(a)(2) ("gap" period claims), and Bankruptcy Code
38
39 § 507(a)(8) (tax claims). In accordance with this provision, the Plan does not classify claims
40
41 of the type described in Bankruptcy Code § 507(a)(1), 507(a)(2), or 507(a)(8). The Plan
42
43 classifies all other Claims and Interests in Classes 1 through 5, as designated in Articles 3-8.
44
45 The Plan thus complies with Bankruptcy Code § 1123(a)(1).
46
47

1 Section 1123(a)(2) requires that a plan "specify any class of claims or interests that is
2 not impaired under the plan." Section 1123(a)(3) requires that a plan "specify the treatment of
3 any class of claims or interests that is impaired under the plan." Articles 4-11 of the Plan
4 provide which classes are impaired or unimpaired and set forth the treatment of each Class.
5 The Plan thus complies with Bankruptcy Code § 1123(a)(2) and Bankruptcy Code
6 § 1123(a)(3).
7

8 Section 1123(a)(4) requires that a plan "provide the same treatment for each claim or
9 interest of a particular class, unless the holder of a particular claim or interest agrees to a less
10 favorable treatment of such particular claim or interest." Articles 4-11 of the Plan provide the
11 same treatment for each Claim in the same class and therefore the Plan complies with
12 Bankruptcy Code § 1123(a)(4).
13

14 LucasFilm incorrectly asserts that it is being treated unequally as compared to other
15 Class 3 claimants because its claim is subject to a claims objection, which may result in a
16 delay of disbursements on LucasFilm's claim. LucasFilm is considering treatment and
17 payment to be the synonymous when they are not. Treatment for all Class 3 claimants is the
18 same under the Plan, but the schedule of disbursements may not be. Each claim is treated the
19 same way under the Plan: all claims are subject to the Plan's procedure for resolving contested
20 claims contained in Article 11. Thus, if any claim is contested under the Plan, the holder of
21 the claim will not receive its distributions until the objection is resolved. The claimant's pro
22 rata distributions will be held in reserve during the pendency of the objection and will be
23

1 disbursed "as soon as practical after [the claim] becomes allowed." The Plan complies with
2
3 Bankruptcy Code § 1123(a)(4).
4

5 Section 1123(a)(5) requires that a plan "provide adequate means for the plan's
6
7 implementation," and sets forth several examples of such adequate means. Article 10 of the
8
9 Plan specifically defines the means for implementing the Plan. The Plan provides for the
10
11 Debtor's retention of necessary property of the estate while it generates sufficient future
12
13 profits to pay off the claims of pre-petition creditors. The Plan also provides for the Debtor's
14
15 distribution of some of the Debtor's cash on hand to creditors. Consequently, the Plan
16
17 satisfies the requirements of Bankruptcy Code § 1123(a)(5).
18
19
20

21 Section 1123(a)(7) requires that a plan contain only provisions that are consistent with
22
23 the interests of creditors and equity security holders and with public policy with respect to the
24
25 manner of selection of any officer, director, or trustee under the plan and any successor to
26
27 such person. The Debtor in this case is a manager-managed limited liability corporation.
28
29 Under the Plan, Adrian Swartout, the current President of the Debtor, becomes the manager
30
31 and CEO of the Debtor and is vested with the power to select other officers. The only sort of
32
33 trustee or director that will be appointed under the plan are members of the Advisory
34
35 Committee, who will oversee the Debtor's reorganization and compliance with the Plan. The
36
37 members of the Advisory Committee will be holders of Class 3 Claims and will have the
38
39 ability to review the Debtor's books and consult with the Debtor on the replacement of Adrian
40
41 Swartout as CEO/Manager and on certain other Major Decisions as they are defined in the
42
43 Debtor's Amended LLC Agreement. The terms of the LLC amendment have resulted from
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47

1 extensive negotiations between the Debtor, equity-holders, and the Unsecured Creditors'
2
3 Committee, resulting in a fair method for the selection of officers, directors, and trustees. The
4
5 Plan is consistent with the interests of creditors and equity-holders and so satisfies the
6
7 requirements of Bankruptcy Code § 1123(a)(7).
8
9

10 **(2) Compliance with Section 1123(b).**
11

12 Section 1123(b) of the Code describes certain permissive plan provisions. The Plan
13
14 contains some of these permissive plan provisions, including provisions of the nature
15
16 described in §1123(b)(1) – (3), as well as a number of additional, appropriate provisions that
17
18 are consistent with the applicable provisions of the Bankruptcy Code § 1123(b)(6). The Plan
19
20 complies with Bankruptcy Code § 1122 and with the mandatory and permissive provisions of
21
22 Bankruptcy Code § 1123. Accordingly, the Plan also satisfies the requirements of Bankruptcy
23
24 Code § 1129(a)(1), which requires that a plan comply with the applicable provisions of the
25
26 Bankruptcy Code.
27
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29

30 Under the Plan, the Debtor proposes to release any potential Avoidance Actions,
31
32 including those against insiders. Settlement of the insider claims is fair and equitable to the
33
34 estate. To determine whether a settlement is fair and equitable, the court should consider the
35
36 following factors:
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38
39

40 (a) the probability of success in the litigation; (b) the difficulties, if any, to be
41
42 encountered in the matter of collection; (c) the complexity of the litigation involved,
43
44 and the expense, inconvenience and delay necessarily attending it; [and] (d) the
45
46 paramount interest of the creditors and a proper deference to their reasonable views...
47

Arden v. Motel Partners (In re Arden), 176 F.3d 1226, 1228 (9th Cir. 1999), citing Martin v.
Kane (In re A & C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986).

1 Settlement of the insider claims is fair and equitable to the estate. Debtor's counsel,
2
3 the Official Unsecured Creditors' Committee, and the Creditors' Committee's financial
4
5 officer examined the Debtor's transfers and determined that subordination of the insider
6
7 claims was sufficient compensation for the waiver of avoidance actions against them.
8
9 Swartout Decl., ¶ 16-17.
10

11
12 The probability of success in a significant percentage of the litigation is unsure as
13
14 there are a number of applicable defenses available to the defendants. Setoffs are not
15
16 recoverable as a preference. See, e.g., Braniff Airways Inc. v. Exxon Co. U.S.A., 814 F.2d
17
18 1030, 1034 (5th Cir. 1987). A significant percentage of the insider transfers were earmarked
19
20 for the payment of specific debts, as Gen Con, Hidden City Games, and Off The Grid
21
22 invoiced and paid each other each other for share of bills for things like rent, internet service,
23
24 and labor. There is a high possibility that such inter-company transfers are unrecoverable as
25
26 preferences under the earmarking doctrine or as fraudulent transfers because the value
27
28 provided in exchange was reasonably equivalent.
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33 Moreover, there are significant difficulties in collection. Swartout Decl., ¶ 16. Peter
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35 Adkison, having invested his assets in Gen Con and his other businesses, has very little in the
36
37 way of assets that would be recoverable. Off The Grid has very few assets that would be
38
39 recoverable. Hidden City Games did receive \$15,000,000 in venture capital last fall, but has
40
41 used that money to fund the development of a website. Hidden City Games recently laid off a
42
43 significant percentage of their employees and is yet to have a profitable month, so recovery
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1 from current assets or the future profits of Hidden City Games appears unlikely and highly
2 speculative.
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4

5 The complexity of the litigation involved, and the expense, inconvenience, and delay
6 necessarily attending it weigh in favor of the settlement. To collect on the claims, the Debtor
7 would have to, at minimum, hire a forensic accountant to review the Debtor's books for the
8 relevant years and pay counsel a significant fee in order to prosecute the claims to judgement
9 and then more fees in order to attempt to collect the judgements obtained. These funds would
10 either come out of the Debtor's operating fund, which could undercapitalize the Debtor and
11 reduce the Debtor's future profits (and payments to creditors) or out of money that would
12 otherwise be paid to creditors. The Debtor, Unsecured Creditors' Committee, and the
13 Creditors' Committees' financial officer do not believe that money could be obtained from the
14 prosecution of such claims faster, or with more certainty, than can be obtained from the
15 Debtor's proposed Plan.
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31 **2. The Proponent Has Complied with Title 11 as Required by Section**
32 **1129(a)(2).**
33

34 Section 1129(a)(2) requires that a plan's proponent comply with the applicable
35 provisions of Title 11. The principal purpose of Bankruptcy Code § 1129(a)(2) is to ensure
36 that the proponent has complied with the requirements of Bankruptcy Code § 1125 in
37 soliciting acceptances to the Plan. 5 Collier on Bankruptcy, ¶1129.02[2] at 1129-21 (15th ed.
38 1993); See In re Michelson, 141 B.R. 715, 719 (Bankr. E.D. Cal. 1992) ("Reassessing the
39 adequacy of disclosure from the vantage of the confirmation hearing is an efficient safeguard
40 of the integrity of the reorganization process").
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1 Section 1125(b) provides that a proponent may not solicit acceptances of its plan
2 unless, at the time of or before the solicitation, copies of the plan, and court-approved
3 disclosure statement are transmitted to the solicitee.
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7

8 The Debtor and their professionals consulted interested parties as to the Disclosure
9 Statement and the possible terms of a Plan but did not solicit acceptances of the Debtor's Plan
10 until after the Disclosure Statement was sent pursuant to Bankruptcy Court order. Pursuant to
11 Federal Rule of Bankruptcy Procedure 3017(d) and this Court's order approving the
12 Disclosure Statement, the Debtor concurrently provided copies of the Amended Plan and the
13 Amended Disclosure Statement to all holders of Claims and also provided Ballots to all
14 holders of impaired Claims. The Disclosure Statement contained adequate information
15 pursuant to section 1125(b) of the Code and was transmitted pursuant to the procedures set
16 forth in section 1125(f) and this Court's orders. Therefore, the Debtor has complied with
17 Bankruptcy Code § 1129(a)(2).
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31 **3. In Accordance with Section 1129(a)(3), the Proponent Has Proposed the**
32 **Plan in Good Faith and not by any Means Forbidden by Law.**
33

34 Section 1129(a)(3) requires that a plan be "proposed in good faith and not by any
35 means forbidden by law." Although the term "good faith" is not defined by the Bankruptcy
36 Code, a plan is considered to be proposed in good faith if it is "intended to achieve a result
37 consistent with the objectives of the Bankruptcy Code." Platinum Capital, Inc. v. Sylmar
38 Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1074 (9th Cir. 2002), citing Ryan v.
39 Loui (In re Corey), 892 F.2d 829, 835 (9th Cir. 1989), cert. denied sub nom., Kulalani Ltd. v.
40 Corey, 498 U.S. 815, 111 S. Ct. 56 (1990). Under Bankruptcy Code § 1129(a)(3), the Court
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1 must assess whether the Plan evidences fundamental fairness in dealing with the Debtor's
2
3 creditors based on the totality of the circumstances. Id.
4

5 The Debtor's Plan has been proposed in good faith. The central purpose of the
6
7 Chapter 11 is to facilitate the reorganization of debtors. Fla. Dep't of Revenue v. Piccadilly
8
9 Cafeterias, Inc., 128 S. Ct. 2326, 2331 (2008). This case is exactly the type of situation for
10
11 which Chapter 11 reorganization was designed. The Debtor, a company with a strong business
12
13 operating the Gen Con Indy event, became insolvent due to a wildly unprofitable expansion
14
15 outside of its core business area. Instead of liquidating itself to pay a series of judgments, the
16
17 Debtor entered bankruptcy, created a Plan to repay 100 percent of the claims owed to
18
19 creditors, and hopes to repay its debts to pre-petition creditors over the next five years and
20
21 emerge from bankruptcy as a profitable enterprise. Jobs were saved, and a four day event
22
23 enjoyed by around thirty thousand people each year will survive. Swartout Decl., ¶ 15.
24
25

26 The Debtor actively negotiated the Plan terms with the Creditors' Committee and
27
28 altered much of its original Plan to accommodate the suggestions, concerns, and requests of
29
30 the Committee. The proposed Plan complies with the most fundamental goals of the
31
32 bankruptcy process: it provides a method for maximizing the value of the estate and
33
34 reorganizing the Debtor by contributing the Debtor's profits until all Unsecured Creditor
35
36 Claims are paid in full and with interest. Moreover, it treats all creditors fairly. The Debtor
37
38 has proposed a Plan that meets the requirements of the Code and is economically and
39
40 operationally feasible.
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1 Gen Con Acquisition Group and LucasFilm have objected to the plan and asserted that
2
3 the Debtor's Plan proposal lacks good faith because: the plan is based on insider interests, the
4
5 plan does not require payment to creditors, the plan's provision for the assignment of servers
6
7 to Hidden City Games, the lack of effective default provisions, the Debtor's pre- and post-
8
9 petition inability to turn over the Make-A-Wish auction proceeds, and the Debtor's refusal to
10
11 consider Acquisition's offer.
12
13

14
15 None of these concerns are significant enough for the totality of the circumstances to
16
17 weigh in favor of a bad faith finding. The central purpose of the Plan is to reorganize the
18
19 Debtor and repay all pre-petition claims. The Plan requires repayment of all creditor claims
20
21 by its terms. "The first payment will be due April 1, 2009, and payments will be due every
22
23 (6) months thereafter until paid in full." Plan, Article 6.1.
24
25

26 The server leases transferred to Hidden City Games do not contain Gen Con's
27
28 proprietary software and have never been used by Gen Con. Contrary to Gen Con
29
30 Acquisition Group's assertion that the situation surrounding the transfer was not disclosed in
31
32 the disclosure statement, the transfers were properly disclosed. "One lease, with outstanding
33
34 payments of around \$7,500, is entirely for Hidden City Games equipment and will be
35
36 assumed and assigned to Hidden City Games." Disclosure Statement at 17. Assignment of
37
38 the lease relieves the Debtor of an unnecessary liability.
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40
41

42 Effective default provisions exist. The payment structure and default provisions were
43
44 negotiated by the Debtor and the Creditors' Committee, and structured to allow the Debtor
45
46 some flexibility to adjust payments up or down according to the profitability of Gen Con
47

1 Indy. Under the Plan and the Debtor's amended LLC Agreement, the Debtor must make
2 payments to the extent the Debtor has the funds to do so. The Debtor is required to provide
3 all unpaid creditors and the Advisory Committee with financial and cash flow statements and
4 consult with the Advisory Board about its funding levels and plan payments. These
5 requirements, coupled with the Debtor's fiduciary duties to its creditors, provide effective
6 remedies in the event of a default.
7

8 The Debtor's inability to pay its debt to Make-A-Wish was not in bad faith, as
9 explained in Ms. Swartout's declaration. Gen Con would have been unable to pay basic
10 operating expenses and gone out of business if it had paid the Make-A-Wish debt pre-petition.
11 Gen Con made every effort to pay the Make-A-Wish. Gen Con was advised by counsel that
12 disbursement on the eve of the petition would be a preference. Gen Con determined that the
13 best course of action would be to make Make-A-Wish a separate class of creditor and provide
14 for Make-A-Wish's immediate payment in the Plan. Swartout Decl., ¶ 15.
15

16 In addition, the Debtor has given due consideration to the offer presented by Gen Con
17 Acquisition Group; it has determined that the offer is not in the creditors' best interest. As
18 explained more fully in Ms. Swartout's declaration (pp. 6-8), the Debtor received several
19 offer letters, signed only by counsel, that did not reveal the true parties in interest or the
20 source of the purported funds needed to finance the offers. Nevertheless, the Debtor promptly
21 analyzed the offers and forwarded them to the Committee. Swartout Decl., ¶ 18, Exhibit A.
22

23 Several deficiencies with the Gen Con Acquisition proposal are noted by Ms.
24 Swartout, including its proposed management and its failure to account for funds sufficient to
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1 pay all potential claims. Most importantly, the Debtor points out that a delay of confirmation
2
3 at this time of year could be extremely harmful to the Debtor. Swartout Decl., ¶ 23.
4
5 Exhibitors will be sending in their first deposits in short order, and planning for Gen Con Indy
6
7 2009 is well under way. Rather than risk losing the opportunity to pay creditors in full, Gen
8
9 Con has continued to focus its efforts on conducting operations and obtaining confirmation of
10
11 the proposed plan of reorganization.
12
13

14
15 **4. All Payments Have Been Properly Disclosed as Required by Section**
16 **1129(a)(4).**
17

18 Section 1129(a)(4) is directed primarily at policing the award and payment of
19
20 professional fees from the estate in chapter 11 cases. See 5 Collier on Bankruptcy,
21
22 ¶ 1129.02[4] at 1129-31 (15th ed. 1993) ("section 1129(a)(4) protects the integrity of the
23
24 reorganization process by assuring creditors that payments from the debtor's estate will be
25
26 subject to court review"). All pre-confirmation fees and expenses incurred by professionals in
27
28 this Chapter 11 case will be subject to the final approval of this Court upon review of the
29
30 applications for fees and expenses that all professionals are required to file under Bankruptcy
31
32 Code § 330. No fees have been paid during the case. Article 2 of the Plan provides for
33
34 payment of allowed administrative expense claims, and, along with Article 11, provides a
35
36 mechanism for dealing with contested claims.
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41 **5. The Identity and Affiliation of All Individuals Proposed to Serve as Post-**
42 **confirmation Directors, Officers, or Voting Trustees Has Been Disclosed**
43 **Section 1129(a)(5).**
44

45 Section 1129(a)(5)(A) requires that the plan proponent disclose the identity and
46
47 affiliations of all individuals proposed to serve as officers, directors, or voting trustees of the

1 debtor, plus affiliates of the debtor participating in a joint plan with the debtor or successors to
2 the debtor under a plan, and additionally, that all such appointments be consistent with the
3 interests of creditors, equity security holders, and public policy. At plan confirmation, Adrian
4 Swartout, the Debtor's current President, will become CEO and Manager of the LLC pursuant
5 to the LLC Amendment and Employment Agreement attached as Exhibits 3 and 4 to the
6 Disclosure Statement.
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14 Ms. Swartout's appointment is consistent with the interests of creditors, equity
15 security holders, and public policy. Under Ms. Swartout's leadership, this year was Gen
16 Con's first profitable year since 2005. Ms. Swartout is confident that she can operate the
17 Debtor with sufficient profitability to fund a plan, Swartout Decl., ¶13, and the Unsecured
18 Creditor's Committee and the equity security holders have indicated their support for Ms.
19 Swartout's appointment as CEO and Manager.
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28 Section 1129(a)(5)(B) requires the disclosure of the compensation of any insider that
29 will be employed or retained by the reorganized debtor. Adrian Swartout's compensation and
30 full employment contract have been disclosed in all their detail. Disclosure Statement at 11.
31 Her annual compensation will begin at \$120,000 and may be annually adjusted subject to the
32 approval of the Advisory Board. She will be entitled to tuition reimbursement and other
33 standard and customary benefits. Ms. Swartout will also receive membership units in the
34 Reorganized Debtor worth 20 percent of the company upon entry into the Employment
35 Agreement, subject to disgorgement if she is terminated before 2012.
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1 **6. Section 1129(a)(6) Does Not Apply to the Plan.**

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3 Section 1129(a)(6) requires that any regulatory commission with jurisdiction over the
4 rates of a debtor approve any rate changes in a plan. This section is inapplicable to the Plan
5 because the Debtor is not subject to the jurisdiction of any rate-setting regulatory commission.
6
7

8
9
10 **7. The Plan Satisfies the "Best Interests of Creditors" Test of Section**
11 **1129(a)(7).**
12

13 The "best interests of creditors" test set forth in Bankruptcy Code § 1129(a)(7)
14 requires the proponent of a plan to demonstrate that, with respect to each impaired class of
15 claims or interests, the holder of each claim or interest in such class has either accepted the
16 plan or will retain or receive under the plan property of a value as of the effective date of the
17 plan that is not less than the amount that such holder would receive or retain if the debtor
18 were to be liquidated under Chapter 7 of the Bankruptcy Code. While not all holders of
19 claims have accepted the Plan here, each holder will receive at least as much as it would
20 receive in a Chapter 7 liquidation. According to the Debtor's liquidation analysis, attached to
21 the Disclosure Statement as Exhibit E, a Chapter 7 liquidation will net the creditors
22 approximately 7% of their claims, while the Debtor's plan offers payment of 100% of
23 creditors' Allowed Claims. Under the Debtor's Plan, the Debtor will pay significantly more to
24 creditors than could otherwise be achieved in a Chapter 7 liquidation and distribution.
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41 Gen Con Acquisition Group and LucasFilm further object to the Debtor's Plan on the
42 grounds that it is not in the best interest of the creditors as required by Section 1129(a)(7)
43 because it improperly valued Hidden City Games stock, software, and computers and failed to
44
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47

1 include consideration of Gen Con Acquisition Group's offer. The Debtor properly valued its
2
3 assets and performed its liquidation analysis correctly.
4

5 The Hidden City Games shares are restricted and may not be sold or transferred absent
6
7 the approval of Hidden City Games' board. Moreover, Hidden City Games is a start-up
8
9 technology company that has never been profitable, and it is unlikely Gen Con could find a
10
11 buyer willing to purchase the stock. It is unlikely that the Debtor will be able to run the
12
13 double gauntlet of finding a party who is both willing to pay money for the shares and able to
14
15 obtain the Hidden City Games' board's approval of the transfer. For this reason, the Debtor
16
17 valued the stock at \$0.00.
18
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21 The software, a registration system for Gen Con events, has no value to anyone save
22
23 Gen Con and would be worthless in a liquidation. It is over five years old, written in an
24
25 archaic computer language, and is customized to suit only Gen Con's needs. Conversion to a
26
27 turnkey solution would require an investment significant enough to make the software
28
29 worthless in a liquidation.
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33 Finally, Gen Con did not consider Gen Con Acquisition Group's offer in its
34
35 liquidation analysis because the offer is not available in a liquidation¹, and even if the offer
36
37 was available, Gen Con's Plan is in the best interest of creditors because it provides for the
38
39 payment of 100% of Allowed Claims at their present value. Section 20 of the Gen Con
40
41 Acquisition Group offer indicates that in order to accept the offer Gen Con must maintain its
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¹ There is a question as to whether the offer is available at all, as page 7 of the offer indicates it must be accepted on or before 5:00 p.m. on December 19, 2008.

1 business and property consistent with its past practices, a situation not consistent with a
2
3 Chapter 7 liquidation scenario.
4

5
6 **8. Section 1129(a)(8) is Satisfied.**
7

8 Section 1129(a)(8) requires that, with respect to each class of Claims, such class has
9
10 accepted the Plan or is not impaired under the Plan. As reflected in the Ballot Summary on
11
12 file with the Court, every voting class has voted to accept the Plan. For the sake of argument,
13
14 the Debtor assumed the Court would estimate LucasFilm's claim at the full amount of its
15
16 proof of claim, even though it disputes that amount and has filed a claim objection. Using the
17
18 highest dissenting claim amount, almost 80 percent in amount and 92 percent in number of
19
20 the unsecured claims in Class 3 voted in favor of the Plan, and the subordinated insider
21
22 unsecured claims voted 100 percent in favor. Clearly, the Creditors in this case support
23
24 confirmation of the Plan, and the requirement of 11 U.S.C. § 1129(a)(8) is met.
25
26
27

28
29 **9. The Plan Complies with Section 1129(a)(9) as to Administrative and**
30 **Priority Claims.**
31

32 Section 1129(a)(9) provides guidelines for the treatment of claims entitled to priority
33
34 under Bankruptcy Code §§ 507(a)(1) -(8). Under the Plan, holders of Allowed Administrative
35
36 Expense Claims entitled to priority under Bankruptcy Code § 507(a)(1) and (a)(2) and holders
37
38 of Allowed Priority Non-tax Claims shall, on the later of the Effective Date or the date on
39
40 which such Claim becomes an Allowed Claim, receive Cash equal to the Allowed amount of
41
42 such Claim, unless the holder of any such Claim agrees to less favorable treatment. Allowed
43
44 Priority Tax Claims will receive deferred cash payments equal to the value of their claims at
45
46 the time of confirmation over a period of five years as provided in Section 1129(a)(9)(C).
47

1 **10. Section 1129(a)(10) Is Satisfied Because Impaired Class 3 has Voted to**
2 **Accept the Plan.**

3
4 Section 1129(a)(10) provides that if one or more classes of claims are impaired under
5
6 a plan, at least one must have accepted the plan, without including any votes of insiders. The
7
8 Ballot Summary on file with the Court reveals that impaired Class 3 voted to accept the Plan.
9

10
11 **11. The Plan is Feasible as Required by Section 1129(a)(11) Because**
12 **Confirmation of the Plan is Not Likely to Be Followed by Liquidation or**
13 **the Need for Further Financial Reorganization.**

14
15 Section 1129(a)(11) requires the Court to find that "[c]onfirmation of the plan is not
16
17 likely to be followed by the liquidation, or need for further financial reorganization of the
18
19 debtor." The purpose of section 1129 (a)(11) is to prevent confirmation of "visionary
20
21 schemes" which promise creditors and equity security holders more under a proposed plan
22
23 than the debtor can possibly attain after confirmation. In re Pizza of Haw., Inc., 761 F.2d
24
25 1374, 1382 (9th Cir. Haw. 1985). The feasibility standard is whether the plan offers a
26
27 reasonable assurance of success, and success need not be guaranteed. Kane v. Johns-Manville
28
29 Corp., 843 F.2d 636, 649 (2d Cir. 1988); In re Monnier Bros., 755 F.2d 1336, 1341 (8th Cir.
30
31 1985).
32
33
34
35

36 The Plan is feasible and has a reasonable assurance of success. Swartout Decl., ¶ 13.
37
38 The Plan provides for the distribution of cash on hand and future profits of the Debtor. The
39
40 Debtor's projections of profits are modest and are based on Gen Con Indy's actual returns for
41
42 the last six years. Gen Con Indy has exhibited a revenue growth rate of nine to thirteen
43
44 percent each year for the last five years, and the Debtor's projections included in the plan
45
46 estimate a growth rate of only three percent. Swartout Decl., ¶ 11. The net income and the
47

1 Debtor's current cash position fund the Plan, which should complete payment of general
2
3 unsecured claims by the end of 2012. Disclosure Statement at Exhibit D. The ability to adjust
4
5 payments down in lean years and up in highly profitable years, proposed by the Creditors'
6
7 Committee, and the oversight and assistance of the Advisory Committee will aid the Debtor in
8
9 a successful reorganization. This modest Plan is feasible and there is virtually no likelihood
10
11 that the Debtor will need future reorganization or liquidation. Swartout Decl., ¶ 13.
12
13

14
15 **12. Section 1129(a)(12) is Satisfied Because the Plan Appropriately Provides**
16 **for all Fees under 28 U.S.C. Section 1930.**
17

18 All fees payable under 28 U.S.C. § 1930 must have been paid or the plan must provide
19
20 for payment on the Effective Date of the plan. 11 U.S.C. § 1129(a)(12). All fees due and
21
22 owing pursuant to 28 U.S.C. § 1930 have either been paid to the clerk of the Bankruptcy
23
24 Court or to the Office of the United States Trustee, and the Confirmation Order specifically
25
26 requires that all fees payable under 28 U.S.C. § 1930 be paid by the Effective Date or as soon
27
28 thereafter as is practical.
29
30
31

32 **B. The Plan Satisfies the Additional Confirmation Requirements Set Forth in**
33 **Section 1129(b) and Should Be Confirmed over the Objections.**
34

35 LucasFilm has objected to confirmation of the plan on the grounds that the plan
36
37 unfairly discriminates against them. Section 1129(b)(1)'s requirement that the plan "not
38
39 discriminate unfairly, and be fair and equitable, with respect to each class of claim or interests
40
41 that is impaired under, and has not accepted, the plan" is applicable only when 1129(a)(8) has
42
43 not been met and the Plan proponent is required to move forward under the cramdown
44
45 provisions under 1129(b), and in such a case the provision only applies to those claims in
46
47

1 classes which *have not accepted the plan*. Neither of those situations exist here in regard to
2
3 LucasFilm: the plan has been approved under 1129(a)(8) and LucasFilm is a member of Class
4
5 3, which voted in favor of the plan.
6
7

8 IV. CONCLUSION

9
10 The Plan is consistent with the goals and policies of Chapter 11 of the Bankruptcy
11
12 Code. As set forth above, the Plan satisfies each and every confirmation standard of
13
14 Bankruptcy Code § 1129.
15
16

17 Moreover, the creditors have voted in favor of the plan. With the exception of
18
19 LucasFilm and Gen Con Acquisition Group, no creditor voted to reject the Plan. The
20
21 creditors have chosen to approve the Plan with the full disclosure that the insider claims
22
23 would be waived and that they would receive payment of 100% of their claims over the next
24
25 five years. Their vote is entitled to deference.
26
27

28 The Debtor has provided evidence of its good faith and the feasibility of the Plan and
29
30 has shown why each objection should be overruled. The Debtor therefore respectfully
31
32 requests confirmation of its Plan as proposed.
33
34

35 DATED this 6th day of January 2009.
36
37

38 CROCKER KUNO PLLC

39
40
41 By /s/ Chris Dale
42 Shelly Crocker, WSBA #21232
43 Chris Dale, WSBA #40788
44 Attorneys for Debtor
45
46
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